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No. 85-406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE R. ARIYOSHI, GOVERNOR,
STATE OF HAWAII, *et al.*,

Petitioners,

v.

SELWYN A. ROBINSON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' REPLY BRIEF

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ARGUMENT

Although the functional target of this federal action is the Supreme Court of Hawaii, respondents totally ignore the questions faced, decided, and postponed by that court in *McBryde I* and *II*. The briefs in opposition, which defend an analysis based on such misunderstanding as a "clearly correct" exposition of "settled principles" presenting "no serious question,"[1] prove more than ever the writ should be granted.

Indeed, the private landowners labor long to prove what petitioners have *never* disputed: *Territory* v. *Gay*, 31 Hawaii 376 (1930), allocated to the Gay & Robinson partnership what was *stipulated* to be "a normal daily surplus of waters [in the Hanapepe watershed,]" *id.* at 382.[2] What respondents ignore is that central issues in the state court in 1973 were what the 1930 decision meant, and ultimately whether it was good law. McBryde requested the Supreme Court of Hawaii in 1969 to decide "what rule of law should be established for surplus waters," McBryde Opening Brief, No. 4879 (Hawaii Dec. 29, 1969), A337. In *McBryde I* the court obliged.

Second, unless respondents concede a *forfeiture* of the federal claims presented by petitions for rehearing after *McBryde I*,[3] those claims were also presented to the state court in 1973. The facial attack on *McBryde* was rejected.

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[1] *See* Brief in Opposition to Petition [hereinafter "Robinson Brief"] 22; Brief of Respondent Olokele Sugar Co. [hereinafter "Olokele Brief"] 5; Brief of Respondents McBryde Sugar Co. and Small Owners [hereinafter "McBryde Brief"] 18. Respondents instead focus on positions *rejected* by the Supreme Court of Hawaii in 1973 and 1982. McBryde Brief 4, 16; Robinson Brief 17-19.

[2] *See* Olokele Brief 2; McBryde Brief 4; Robinson Brief 2-3. Nor do petitioners dispute *Gay*'s affirmance in the Ninth Circuit, which reviewed the article I court's decree for "manifest error" in applying "local law[.]" 52 F.2d at 359.

[3] *See Ake* v. *Oklahoma*, 105 S. Ct. 1087, 1092 (1985); *Orr* v. *Orr*, 440 U.S. 268, 274 (1979). The suggestion that petitioners seek to mislead the Court, McBryde Brief 6 n.8; Robinson Brief 14, is amazing. Procedural default *was* urged by Hawaii in *McBryde III*, *see* Motion to Dismiss 8 (question 1), *reprinted in* McBryde Appendix A, but petitioners do not raise that issue here. If, however, this Court "gave credence to the Attor-

After this Court acted in 1974, had respondents repaired to state court the validity of *McBryde,* as applied to particular diversions, could have been litigated without "months" of "cogitation and labor" by a federal judge and a "sojourn" on appeal "in excess of six years." McBryde Brief 8, 12. For although the facial attack was not to be relitigated, petitioners had no right to enjoin respondents' diversions. Following *McBryde II,* the case should have continued "at the trial level" to resolve "factual and legal issues[,]" including "whether the cessation of any particular diversion would in fact constitute a 'taking.' " *Robinson II,* 65 Hawaii 641, 651, 653, 666, 658 P.2d 287, 296, 297, 305 (1982), A14, 23, 24, 42.

The Ninth Circuit's decision cannot withstand scrutiny. It generates not just a "conflict" but an unprecedented usurpation of a state court's power to decide matters of state and federal law. From Article III to the Takings Clause, from abstention to res judicata, the court below rewrote doctrines designed to prevent exactly what occurred here: the mushrooming of already-complex state court adjudication into "more than a half century of litigation," Robinson Brief 16.

I. The Ninth Circuit's Construction of the Takings Clause Defied Decades if not Centuries of Legal Understanding

Respondents' ultimate contention, taken seriously, produces astounding consequences: when a court decree "upsets long-settled expectations in the ownership of real property," *Oneida County* v. *Oneida Indian Nation,* 105 S. Ct. 1245, 1272 (1985) (Stevens, J., dissenting), the sovereign must pay "just compensation" to all who are thus "upset." *Robinson III,* 753 F.2d at 1471, A5; McBryde Brief i. This is not the law.

That it is not *at all* true, let alone "virtually obvious," McBryde Brief 10, that state courts " 'take' property for

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ney General's [claim.]" McBryde Brief 7; *see* 417 U.S. 962 (1974), summary reversal would be required.

public use by declaring the law," Petition 27 n.34, derives from the "property" the Constitution protects: the " 'existing rules or understandings that stem from an independent source such as state law[,]' " *Cleveland Board of Educ.* v. *Loudermill*, 105 S. Ct. 1487, 1491 (1985) (citation omitted); *accord, Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862, 2872 (1984). An adjudication that " 'determine[s] the respective rights of all parties [arising under state law]' " Petition 7 (citation omitted),[4] does not cause a "taking" when one or more parties lose.[5]

This result follows the general rule: Whether a "taking" occurs depends on " 'the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations.' " *Ruckelshaus* v. *Monsanto Co.*, 104 S. Ct. 2862, 2875 (1984) (citation omitted). The "character" of adjudicating water rights cannot "deprive the owner of all or most of his interest in [his] property[,]" *San Diego Gas & Elec. Co.* v. *San Diego*, 450 U.S., 621, 653 (1981) (Brennan, J., dissenting): adjudication determines if property *exists*.[6] That large sums are lost does not mean "reasonable investment-backed expectations" have been defeated. *County of Kauai* v. *Pacific Standard Life Ins. Co.*, 65 Hawaii 318, 338, 653 P.2d 766, 780 (1982), *appeal dismissed*, 460 U.S. 1077 (1983). By

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[4] Having never appealed, respondents challenge the finding that their rights were *not* governed by "federal common law[,]" 441 F. Supp. at 580, A97, and, as erroneously, contend *Territory* v. *Gay* originated in a court to which the federal district court succeeded. *See* Olokele Brief 5.

[5] The Framers would have viewed it odd that courts construing statutes pre-dating any "vested" right, as did the Supreme Court of Hawaii, could "take" property; ideas of judicial "legislation," *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting), had not emerged. *See Linkletter* v. *Walker*, 381 U.S. 618, 622-23 (1965); *cf.* Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 701, 707 (1985) (origins in limits "on gubernatorial action" and "fear of the legislature").

[6] The "governmental actions" historically attacked by Takings Clause review, including "formal condemnation proceedings, occupancy, physical invasion, or regulation," *San Diego Gas & Elec. Co.*, 450 U.S. at 654 (Brennan, J., dissenting), all presuppose the *existence* of property.

settled practice, risks of title defects have been borne by the purchaser of property, not the sovereign whose courts declare the defect. Title insurance[7] would be irrelevant if such risks could be transferred to the public.

In this case, the Ninth Circuit invalidated a state court decision that declared a defect in an asserted title "'to use the water for any purpose, . . . to waste the water, and . . . to prevent others from using the water.'" Petition 19 (citation omitted). At worst, the 1973 state court result was arrived at by devices "familiar to every law student," *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982): the rule that "judicial decisions operate retrospectively[,]" *id.*; the understanding that a court may decide "whether prior decisions should be overruled or reconsidered [,]" *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 501 (1982); and the authority to notice plain error, *see Blonder-Tongue Laboratories, Inc.* v. *University of Illinois*, 402 U.S. 313, 320-21 & n.6 (1971); *Guanzon* v. *Kalamau*, 48 Hawaii 330, 335 n.3, 402 P.2d 289, 292 n.3 (1965).[8] Defying the rule that "State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guaranties," *Brinkerhoff-Faris Co.* v. *Hill*, 281 U.S. 673, 681 n.8 (1930), the Ninth Circuit transformed prudential limits into constitutional imperatives. The ruling below was based on fundamental error. *Washington* v. *Davis*, 426 U.S. 229, 248 (1976); Sup. Ct. R. 34.1(a); *see* McBryde Brief i; Petition 27 n.34.[9]

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[7] Title insurance evolved from insuring legal opinions on litigation risks. Brown, *Insured Legal Opinions*, 1961 Ins. L.J. 712.

[8] Noticing plain error is especially proper when the state litigates a case of "public importance involving basic rights [of the public]." *In re Bishop*, 53 Hawaii 604, 609, 499 P.2d 670, 673 (1972) (Abe, J., concurring). *See generally* Phillips, *The Appellate Review Function: Scope of Review*, 47 *Law & Contemp. Probs.* 1, 8-9 (Spring 1984); *Engle* v. *Isaac*, 456 U.S. 107, 135 n.44 (1982) ("States have the primary responsibility to interpret and apply their plain-error rules.").

[9] Although if a state court concedes a litigant claims a right recognized as property, the state must afford process to vindicate the claim, a denial

II. The Ninth Circuit Should Not Ever Have Reached the Merits.

Numerous doctrines barred the Court of Appeals from acting.

A. There Was No Ripe Controversy

Respondents' arguments why this case presents a ripe controversy are refuted by their own theory of "judicial taking." While urging it is "clearly correct" to view the Takings Clause as blind to whether expectations are defeated by legislative or judicial action, Robinson Brief 22, to evade the holding in *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 105 S. Ct. 3108, 3117 (1985), respondents reverse field and argue there is a "controversy" because "[t]he conduct of the Hawaii Supreme Court in *McBryde* was judicial, not administrative[,]" McBryde Brief 15; *see* Robinson Brief 21; Olokele Brief 10. Respondents cannot have it both ways. If the Takings Clause applies to the Judiciary, the Judiciary should fare no *worse* than the Executive.

Respondents' efforts to ripen their claims in advance of any "final decision" prohibiting any diversion rely on a demonstrably erroneous view of the protections available in state court. Thus, while respondents may assert in Hawaii's trial courts equitable defenses as well as claim that enjoining a diversion "would in fact constitute a 'taking,' " *Robinson II*, 65 Hawaii at 666, 658 P.2d at 305, A42; *cf. Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 n.40 (1981), the Robinsons incorrectly assert state courts have been directed "to refuse

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of due process no more compels granting the claim than do employees' rights to a hearing guarantee they may not be fired. *See Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982). If a procedural due process violation is found by a *federal* court, it is not that court's province to adjudicate the underlying property claim, but rather to see that the *state* adjudicates it. *Id.* Here there was no procedural error that would require even a remand to the state court. *See infra* p. 6.

to hear any constitutional claims," Robinson Brief at 20.[10] If it is true "improvements costing many millions of dollars had been constructed on the affected lands[,]" *Robinson III*, 753 F.2d at 1474, A11, and diversions have been ongoing for decades, Olokele Brief 2, respondents' state-law defenses as to existing diversions appear substantial. *See Reppun* v. *Board of Water Supply*, 65 Hawaii 531, 562 n.24, 563 n.25, 656 P.2d 57, 77 & nn.24-25 (1982), *cert. denied*, 105 S. Ct. 2016 (1985). That fact "confirms the conclusion that the taking issue decided by the District Court simply is not ripe for judicial resolution." *Hodel*, 452 U.S. at 297.[11] There plainly was no controversy below.[12]

B. Relitigation Was Barred.

The court below need not have reached the dubious claim that mere announcement of *McBryde I* constituted a "taking" or the equally meritless assertion that reversing the trial court denied respondents the "process due" on appeal. Both questions were decided when the state court rejected respondents' petitions for rehearing. The arguments prof-

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[10] Olokele relies on language from *McBryde I*, Olokele Brief 11, but ignores its clarification in *Robinson II*, *see* A51.

[11] *Pacific Gas & Elec.* v. *Energy Resources Comm'n*, 461 U.S. 190 (1983), *cited*, Olokele Brief 10, is consistent; unlike takings claims, which involve an "'ad hoc, factual' inquiry[,]" *Monsanto Co.*, 104 S. Ct. at 2874, the pre-emption issue in *Pacific Gas* "is predominantly legal." 461 U.S. at 201; *see Thomas* v. *Union Carbide Agri. Prods. Co.*, 105 S. Ct. 3325, 3333 (1985) (same). And, unlike *Pacific Gas*, the limited uses for respondents' land, *Robinson I*, 441 F. Supp. at 575, A86, belie the claim. Olokele Brief 10, that respondents' behavior depends on immediate adjudication.

[12] *Williamson County*, in which ripeness was raised *sua sponte*, 105 S. Ct. at 3116, refutes respondents' suggestion, McBryde Brief 15; Robinson Brief 17; Olokele Brief 11, that ripeness can be waived. Resting on the erroneous claim that their alleged rights arise under federal law, respondents do not address at all their failure to satisfy the "well pleaded complaint rule," *see* Petition 24 n.30, or the standing problems raised by their own apparent concession, McBryde Brief 15 n.17, that diversions could be restrained via the police power. *Cherry* v. *Steiner*, 543 F. Supp. 1270, 1278 (D. Ariz. 1982), *aff'd*, 716 F.2d 687 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 1719 (1984).

fered to evade the limits imposed by 28 U.S.C. §§ 1257 and 1738 only confirm these questions were not open for relitigation.

Thus McBryde's evasion of the bar imposed by § 1257, *see District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462 (1983), consists of the claim that if a state court violates only the Takings Clause, but not procedural due process, "aggrieved parties will have their direct rights of review in this Court[,]" McBryde Brief 11, but if the state court commits both errors this Court's direct appellate jurisdiction fails, *id.*, and the District Court takes over. Respondents do not begin to explain how this result—or the presumption on which it rests[13]—squares with the policy of expeditious, final correction of state court error, or precedent,[14] *see, e.g., Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

With respect to § 1738 and due process, respondents build a straw man. Petitioners do not assert § 1738 preclusion of the "validity of *McBryde* as applied [to a specific diversion]," Petition 26 n.33, for respondents have ignored the state court process available on that question. *See Robinson II*, 65 Hawaii at 666, 658 P.2d at 305 (1982), A42.[15]

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[13] If, like respondents, one ignores the Justices' clear answers, a presumption is necessary to determine the scope of decision in *McBryde* since the only relevant evidence (other than the answers) is filing of the petitions and affirmance. *Cf. Sandstrom* v. *Montana*, 442 U.S. 510, 517 (1979). The Ninth Circuit manifestly used the wrong presumption, however, and respondents' attempts to dress the conclusion of non-decision as a "factual finding," McBryde Brief 16; Olokele Brief 8, all but concede at least remand is in order. *See United States Postal Serv.* v. *Aikens*, 460 U.S. 711, 717 (1983).

[14] Respondents offer no policy basis for requiring a litigant who prevails through the state system and in this Court to endure an eleven-year odyssey through the federal system solely because the state court does not explicitly discuss federal claims, *Feldman*, 460 U.S. at 484 n.16, nor any claim that a *Feldman* bar here is unconstitutional. *See Thomas* v. *Union Carbide Agri. Prods. Co.*, 105 S. Ct. 3325, 3339 (1985). If there was no final judgment in *McBryde* under 28 U.S.C. § 1257, *see San Diego Gas & Elec. Co.* v. *San Diego*, 450 U.S. 621 (1981), *Feldman* applies a fortiori. Comity, *see infra*, would also compel dismissal.

[15] Respondents thus advance the groundless claim that requests "to present evidence" have been "rebuffed by the state court at every turn,"

The *facial* attack on *McBryde,* however, the only attack litigated below,[16] must be barred unless the Constitution requires oral argument before *any* claim may be finally adjudicated. The Due Process Clause, however, is not that inflexible, especially where able counsel were afforded four *months* to prepare written submissions. *Walters* v. *National Assoc. of Radiation Survivors,* 105 S. Ct. 3180, 3189 (1985); *see* Friendly, *"Some Kind of Hearing,"* 123 U. Pa. L. Rev. 1267, 1281 (1975). Unless this Court wishes to create another "major exception to the doctrine of res judicata," *Lehman* v. *Lycoming County,* 458 U.S. 502, 512 (1982), the judgment below must be reversed.

C. The State Grounds Were Adequate.

Respondents recognize the federal district courts may no more issue advisory opinions on state law matters than may this Court. Robinson Brief 12 (citing *O'Neil* v. *Northern Colorado Irrigation Co.,* 242 U.S. 20, 26 (1916)). The lower courts did not come close to observing the independent and adequate state ground doctrine. Petition 27 n.34.

Demorest v. *City Bank Co.,* 321 U.S. 36 (1944), holds that when a state enacts retroactive legislation,[17] there is no federal jurisdiction to entertain a takings claim if the state court articulates a "fair or substantial basis" for

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McBryde Brief 18. The process afforded belies respondents' suggestions, McBryde Brief 9; Olokele Brief 9; Robinson Brief 15, they were denied due process in 1982 because the now-retired Chief Justice had participated in the Ninth Circuit proceedings as amicus curiae. In *Feldman,* this Court credited state court responses when the state court judges were named as *defendants. See* 460 U.S. at 473 n.9. The claim, Olokele Brief 9, that the answers to the certified questions are not binding as to state law matters, is frivolous.

[16] The amended judgment states *any* enforcement of *McBryde* to limit diversions or transfers is "unconstitutional," but that "[i]t is impossible to ascertain precisely the extent of the economic injury which would result from interference by the defendant State Officials with such private water rights." Robinson Appendix A at ¶ 2.

[17] If Part I, *supra,* is correct, *Demorest* is irrelevant.

ruling there was no pre-existing rule of property to be infringed. *Id.* at 42 (citation omitted). This deference reflects the reality that whether a result requires overruling past cases, upon which there has been reliance, or an earlier decision is unworkable, and hence could generate no reliance, are themselves difficult legal questions that state judges are in the best position to answer.[18]

In 1982, the Supreme Court of Hawaii unanimously informed the Ninth Circuit that "Hawaii's law regarding surplus water was at the time of *McBryde* in such a state of flux and confusion that it undoubtedly frustrated those who sought to understand and apply it." *Robinson II*, 65 Hawaii at 668, 658 P.2d at 306, A44. The court closely analyzed the claims on the state court appeal, *id.* at 673, 658 P.2d at 309, A50, which indicated respondents held no more than a "'"'unilateral expectation or an abstract need[,]"'"' Petition 27 n.34 (citation omitted). If the independent and adequate state ground doctrine were ever meant to apply, the panel should have reversed, *cf. Pennhurst State School & Hosp.* v. *Halderman*, 104 S. Ct. 900, 920 n.32 (1984).

D. The Grounds for Abstention Were Compellingly Present

Beyond the Robinsons' bare statement that "[n]o other action is pending," Robinson Brief 20—which attempts, by denying the state court's answers, *Robinson II*, 65 Hawaii at 651, 653, 658 P.2d at 296, 297, A19, 23, to avoid outright dismissal under *Samuels* v. *Mackell*, 401 U.S. 66 (1971)—and the naked claim that the state courts are unable to adjudicate federal claims, Robinson Brief 20, respondents present no answer at all to petitioners' claim that the instant facts "present a classic occasion for abstention." Petition 24.

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[18] Similar debates confront this Court. *Compare Pennhurst State School & Hosp.* v. *Halderman*, 104 S. Ct. 900, 914 n.21 (1984) ("wrong to say" cases "overruled"), *with* 104 S. Ct. at 922 (Stevens, J., dissenting) ("Court repudiates at least 28 cases"). *Compare Garcia* v. *SAMTA*, 105 S. Ct. at 1005, 1016 (1985) (*Usery* "unworkable in practice"), *with* 105 S. Ct. at 1024 (Powell, J., dissenting) (*Usery* used "familiar" test).

Regardless whether state proceedings are pending, and dismissal is required, *see Middlesex County Ethics Comm.* v. *Garden State Bar Assoc.*, 457 U.S. 423 (1982), "federal courts should abstain from decision when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided." *Hawaii Housing Auth.* v. *Midkiff*, 104 S. Ct. 2321, 2327 (1984). The defenses to injunctive relief to restrain diversions are undergoing a critical formative period in Hawaii. *See Reppun* v. *Board of Water Supply*, 65 Hawaii at 560 n.22, 656 P.2d at 76 n.22. The Court of Appeals should have abstained.

CONCLUSION

For the foregoing reasons, the writ should be granted.

Respectfully submitted,

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